United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

No. 76-4046

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARRIER AIR CONDITIONING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

and

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO,

Intervenor.

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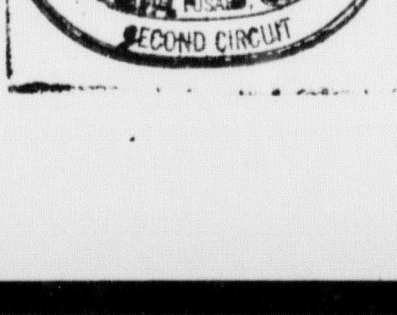
P/S

ON PETITION TO REVIEW AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR CARRIER AIR CONDITIONING COMPANY



Kenneth C. McGuiness
Robert E. Williams
Douglas S. McDowell
1747 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Attorneys for Carrier Air Conditioning Company

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REPLY BRIEF FOR CARRIER AIR CONDITIONING COMPANY

This reply brief is addressed to certain contentions raised in the brief of the Respondent, National Labor Relations Board, filed on June 25, 1976.

1. In the section of their brief entitled "The Board's Findings of Fact," the Board's appellate counsel set forth a number of propositions which were not found to be facts by either the Administrative Law Judge or the Board itself, and which are not supported by the evidence. The following examples are illustrative of this briefing technique.

a. The Board's brief states (Bd. br. 4) that "Local 28 has historically and traditionally fabricated, assembled and installed all plenums in New York City on an exclusive basis." (Emphasis added). This statement is not only materially different from the Board's own finding (A.33), but is contrary to uncontroverted record evidence. In fact, the record shows that Carrier has marketed, and Local 28 members have installed, in New York City "literally hundreds of thousands" of air conditioning units of various types with plenums prefabricated and assembled by Carrier's employees in its Tyler, Texas, plant, without Local 28 raising any "question or problem with respect to who was to perform the work or fabrication" of those plenums. (A.7; 294-297).

b. The Board's brief recites portions of the testimony of Triangle Sheet Metal Company officials regarding their fabrication of plenums for the Moduline units installed at the Police Office Building job (Bd. br. 5) without acknowledging that the Administrative Law Judge expressly discredited this testimony in favor of the substantially different account of those events given by Carrier officials (A.22).[1/] Thus, the brief states that Triangle believed the air leaks which developed in the units fabricated by its employees were "due to improper specifications furnished by Carrier," but fails to note that the ALJ rejected this contention and found instead that "Triangle did not prepare said plenums properly." (A.22). Similarly, the Board's brief conveys the misimpression that Moduline plenums could easily be fabricated in Local 28 shops by reciting testimony that the work involved was "very simple sheet metal work." (Bd. br. 5). This ignores the ALJ's diametrically opposite finding

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1. The Board itself stated in its decision that it was adopting the ALJ's credibility findings. (A.30, n.3).

that "the inability of Triangle and other subcontractors...to fabricate a workable plenum demonstrates that Carrier was unable to obtain any orders for Moduline Units if plenums therefore were to be fabricated separately by others than Carrier." (A.22).[2/]

c. The Board's brief misconstrues the October 8, 1973, letter from Three Boro to Acme, in which Three Boro stated, "We take exception to [various listed items including] plenums for Carrier units." (A.116). Thus, the brief represents Three Boro's statement as an "objection" to the use of the Carrier units with prefabricated plenums. (Bd. br. 7). However, this interpretation was refuted by evidence showing that the statement merely constituted Three Boro's acknowledgment that the plenums for the Carrier units were among those items to be excepted or omitted from the work which Three Boro was to perform on the job. (A.400-402). As witness Joseph Reyes testified without contradiction, "The paragraph takes exception to the following. That is, he was not quoting to fabricate the plenums." (A.401). Nothing in the Board's own findings justifies its counsel's presentation as "fact" of a contrary interpretation of the letter without even mentioning Reyes' testimony.

2. The Argument section of the Board's brief is replete with appellate counsel's attempts to justify the result reached in this case on grounds which the Board itself never discussed and did not rely upon. This Court, however, must confine its consideration to the validity of the Board's own reasoning.

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2. The Board adopted the ALJ's findings to the extent consistent with its own. The Board's own decision contains nothing inconsistent with the ALJ's findings quoted above, and certainly contains nothing which supports the version of the "facts" set forth in its appellate brief in this regard.

As the Supreme Court stated in N.L.R.B. v. Metropolitan Life Ins. Co., 380 U.S. 438, 444 (1964), "...the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc ratiomalizations for agency action....' "

a. One example of counsel's post hoc rationalization is their portrayal throughout the brief of the no-subcontract clause in this case as a "work preservation" clause of the sort recognized as lawful by the Supreme Court in National Woodwork Mfrs. Ass'n. v. N.L.R.B., 386 U.S. 612 (1967). The Board itself made no such finding. Instead, it specifically stated that it did not believe it necessary to consider the "secondary-primary employer and work preservation issues on which the Administrative Law Judge passed." (A. 41).[3/] Of course, the contract clause in question here is drafted broadly to include the usual self-serving declaration of a work preservation purpose. But this does not make it a valid work preservation clause if, in fact, the work to which it refers is not traditional work of the Union's members. National Woodwork, supra.[4/] And since the Board dismissed the complaint without passing on that issue, the Board's legal theory cannot now properly be reviewed on the premise that the clause as written is, in fact, a valid "work preservation" agreement.

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3. The ALJ had found that "the said clauses in the contracts of Local 28 were not to preserve work for its members..." (A.21, emphasis added).

4. The no-subcontracting clause in this case speaks in terms of all "plenums" without limitation, even though, as shown above, p. 4, many varieties of plenums installed in New York have not traditionally been fabricated by the Union's members. Thus, there is no real question that the clause as written extends far beyond the actual plenum fabrication work traditionally done by Local 28 members. Repeated assertions in the Board's appellate brief that the clause is a "valid work preservation" agreement cannot alter the fact that its broad terms lay claim to much which is not traditional or historic work of Local 28.

The fallacy of Board counsel's reliance on this "work preservation" premise is compounded by their repeated assertions that the monetary penalty sought by Local 28 in this case represented "compensation for lost wages" or "actual costs" to Local 28 members resulting from the use of units with prefabricated plenums. (Bd. br. 19, 20, 21, 26). Of course, this rationalization begs the very question which the Board itself expressly declined to decide. For if the use of the units did not actually result in loss of traditional work for the Union's members, the enforcement of the penalty cannot even arguably have had the "compensatory" or "wage preservation" objective which Board counsel attribute to it. Rather, its only purpose must be seen as that of coercing neutrals to give Local 28 members work being done by Carrier's Tyler, Texas, employees. This, of course, is precisely what the ALJ found the Union's purpose to have been (A.21).

b. The Board's appellate counsel also go far beyond the Board's own stated rationale in their discussion of the use of arbitration procedures to enforce work-restriction provisions in a labor agreement (Bd. br. pp. 15, 16-20). At the outset, it must be noted that the contract in this case does not provide for arbitration by a neutral third party, as Board counsel's argument implies. The tribunal established to decide disputes under this agrement is, rather, a Joint Adjustment Board consisting of an equal number of Union and contractor representatives. As pointed out in our opening brief, there is no guarantee of impartiality in the composition of the tribunal, and there is good reason to believe that in many cases the contractors' representatives will be biased in favor of the interpretation of the agreement which ensures the most work for New York area shops. (Br. pp. 45-46). Certainly there is no basis for Board counsel's assertion that such a body shares the "essential characteristics" of a judicial tribunal (Bd. br. 18-19).

Counsel's citations (Bd. br. 17, 19) of this Court's decision in Nabisco, Inc. v. N.L.R.B., 479 F.2d 770 (2nd Cir. 1973), and similar cases imply that the Board's disposition of this case is comparable to a decision by the Board to defer to arbitration under the doctrine of its decision in Collyer Insulated Wire, 192 NLRB 837 (1971). However, deferral under Collyer is appropriate only where all parties have agreed to be bound by the arbitrator's decision and "it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act." 192 NLRB at 841-842. Even then, the Board retains jurisdiction and may review the fairness of the arbitration proceedings and the compatibility of the decision with the Act's purposes in later appropriate proceedings. None of these safeguards is present here. There has been no finding, nor is there any basis to find, that the Joint Adjustment Board's disposition of charges against contractors who install Carrier's units will take account of the Act's secondary boycott purposes or render a decision compatible therewith. Carrier and other neutral parties whom the Act's secondary boycott provisions are intended to protect have no representation before the Joint Board. Nor is there any way of obtaining later Board review, for unlike in Collyer, the Board did not retain jurisdiction in this case, but dismissed the complaint outright. In these circumstances, there is clearly no merit to Board counsel's reliance on cases discussing the federal policy favoring arbitration and supporting deferral of unfair labor practice issues to arbitral tribunals.

c. In their discussion of the probable effects of the contract clauses and their enforcement, counsel again improperly supplement the Board's findings

with several determinations of their own. For example, they assert (Bd. br. 21) that the imposition of the monetary penalty for General's alleged contract breach "would not in all likelihood cause either General, the subcontractor, or Cohan, the general contractor, to boycott the Carrier moduline units." A few paragraphs later (Bd. br. 22) this assertion is elevated to the status of a "show[ing]" that "this contractual mechanism for contract enforcement contemplated that the performance of the job would proceed without impediment."

The Board, of course, made no such findings, nor could it properly have done so on this record. Counsel's speculation as to the likely effect of the penalty provision upon General is directly refuted by General's own reaction in the concrete instance in which the Union did seek such a penalty. General's immediate reaction was to refuse to continue handling the Carrier units and protest that it "was not going to pay the fine." (See our opening brief, pp. 25, 34). Simiarly, the assertion that the contract "contemplated that the ... job would proceed without impediment" is not only unsupported by anything in the contract itself, but is directly contrary to the understanding uniformly expressed at the hearing by the union and employer representatives familiar with day-to-day operations under that agreement. Their consistent view equated enforcement of this contract with a refusal to allow the Moduline unit to be used in the New York City area. (A. 13, 25, 35, 135, 219-220, 464-469). Nowhere in the record is there a single statement by anyone familiar with the administration of this contract that supports Board counsel's view of what it "contemplated."

The thrust of Board counsel's argument is that the Union's enforcement of the contract did not really have a coercive "cease doing business" object

within the meaning of Section 8(b)(4)(B), because contractors could continue business as usual by simply operating in violation of the work restrictions and paying a continuing series of monetary penalties "fixed in advance." (Bd. br. 19). But the Board did not find, contrary to counsel's assertion, that in the face of such penalties "the contractor and the manufacturer are able to proceed with business on an uninterrupted basis." (Ibid). Carrier's experience to the contrary is too well-documented on this record to permit such a conclusion. Moreover, even assuming it may be possible for a contractor to engage in a continuing course of violations of the contract's ban on prefabricated plenums, it is clear that at least one object of the penalty provisions and their enforcement is to compel contractors to comply with that ban. And, as shown in our opening brief (pp. 30, n. 25, and 36, n. 32), the existence of such an object, even if not the only object of the agreement and its enforcement, is sufficient to establish violations of Sections 8(b)(4)(B) and 8(e).

3. Board counsel's argument in support of the dismissal of the Section 8(e) allegations of the complaint turns essentially on the premise that Local 28's application of its contract work restrictions to Carrier's Moduline units "involved the Union's acting unilaterally, whereas it takes a bilateral agreement to establish a violation of Section 8(e)." (Bd. br. 35). This rationalization must fail for three reasons: (1) it is not supported by the facts; (2) it is not supported by the law; and (3) again, it is not the basis on which the Board itself decided the case.

The contention that Local 28's interpretation of the agreement as applied to Carrier's units was purely "unilateral" ignores the entire factual background

of this dispute. Most notably, it ignores the action of the union-management Joint Adjustment Board on April 26, 1973, in rejecting a proposal to "modify the agreement" so as to allow the installation of these units. (See our opening brief, pp. 17, 33). This JAB action, which only shortly preceded the unfair labor practices alleged in the complaint,[5/] plainly reflected the parties' bilateral interpretation of the clause as an agreement prohibiting the use of Carrier's units with prefabricated plenums. When the Union's subsequent enforcement action is considered against the background of this current, authoritative interpretation of the agreement by a board comprising representatives of both the Union and the signatory contractors, as properly it must be (see Bryan Mfg. Co. v. N.L.R.B., 362 U.S. 411 (1960)), there is clearly no merit to Board counsel's contention that the Union was merely seeking unilaterally to force the contractors to "enter into a new and different version of [the] clause." (Bd. br. 37). Rather, it is fully apparent that both parties understood and acquiesced in the interpretation of the clause which made it applicable to the Carrier units.

Furthermore, contrary to Board counsel's assertion (Bd. br. 37), this interpretation of the clause was unmistakably acquiesced in by General within the Section 10(b) period when General responded to the Union's breach-of-contract charges by ceasing installation of the Carrier units on the Babies Hospital job and thereafter agreeing to pay the fine sought by the Union for its "violation." (See our opening brief, pp. 25). Had General disagreed with the Union's interpretation of the clause, it could have contested the charges

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5. The JAB action occurred less than six months before the filing of the Section 8(b)(4)(B) charges herein, but more than six months before the 8(e) charges.

against it. Its failure to do so and payment of the fine instead was the clearest possible form of acquiescence, short of an express admission that it had violated the clause. Board counsel's contention that no acquiescence by General can be found because "Carrier itself short-circuited the grievance procedure by voluntarily reimbursing General for the damages sought by Local 28 before the Joint Adjustment Board had ruled" (Bd. br. 37) is absurd. The very reason Carrier made that arrangement was because General had yielded immediately to the Union's charges, without even awaiting action by the Joint Board.

In any event, both the Board and this Court have recently recognized that when a union seeks enforcement of a contract clause in a manner forbidden by Section 8(e), it is not necessary for a signatory employer to comply with the union's demands before the clause can be held to have been "reaffirmed" for purposes of establishing an unfair labor practice within the Section 10(b) period. See Danielson v. International Organization of Masters, Mates and Pilots, AFL-CIO (Seatrain Lines, Inc.), 521 F.2d 747, 754 and n. 8 (2nd Cir. 1975); Bricklayers and Stone Masons Union, Local No. 2 (Gunnar I. Johnson & Son, Inc.), 224 NLRB No. 132 (June 23, 1976), and cases there cited. Rather, the union's assertion of continued enforceability of such a clause in circumstances in which enforcement would amount "to an attempt to control 'hot cargo' in a manner itself forbidden by the Act" is sufficient to establish an unlawful reaffirmation. N.L.R.B. v. Local 28, Sheet Metal Workers, 380 F.2d 827, 830 (2nd Cir. 1967); Danielson; supra.

Board counsel's attempt to justify the dismissal of the Section 8(e) allegation on the basis that the Union acted unilaterally is, of course, simply

another instance of impermissible post hoc rationalization. The Board itself based its decision solely on the rationale of its decision in Associated General Contractors of California, 207 NLRB 698 (1973), a case in which there could be no question as to the bilateral reaffirmation of the contract clauses within the Section 10(b) period, because they had actually been enforced by a joint union-employer tribunal and the contractors had paid the penalties. Thus, the asserted lack of "reaffirmation" or "acquiescence" by the contractors, besides being unsupported by the facts, was plainly not a part of the Board's rationale for dismissing the Section 8(e) allegations in this case. Rather, the Board simply relied on a rote application of its discredited AGC of California theory that a union and an employer may lawfully enforce an agreement requiring the employer to boycott prefabricated goods, without regard to "primary-secondary or work preservation" considerations, so long as the enforcement is effected "through peaceful means provided in the agreement." (A.41).

We submit for the reasons stated in our main brief that the rationale on which the Board based its dismissal of the 8(e) allegations is invalid. Board counsel's strenuous attempts to supply some other tenable rationale on which the Board's decision can be sustained simply stand as further persuasive evidence of the deficiency of the Board's own reasoning.

CONCLUSION

For the reasons stated herein and in our opening brief, it is respectfully submitted that the Board's dismissal of the complaint should be reversed and that the Board be ordered to enter an appropriate remedial order.

Respectfully submitted,

Kenneth C. McGuiness
Robert E. Williams
Douglas S. McDowell
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Carrier Air Conditioning Company

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On Petition to Review an Order of the
National Labor Relations Board

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the Reply Brief of Carrier Air Conditioning Company in the above-captioned case have this day been served by certified mail upon the following parties:

Sol Bogen, Esq.
One Penn Plaza
New York, New York 10001

Elliott Moore, Esq.
Deputy Association General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Regional Director, Region 2
National Labor Relations Board
Federal Building, 36th Floor
26 Federal Plaza
New York, New York 10007
Attn: Raymond P. Green

Robert E. Williams

Dated at Washington, D.C.
this 9th day of July, 1976.